

**THE *QUI TAM* RELATOR: A MODERN DAY GOLDBLOCKS SEARCHING
FOR THE JUST RIGHT CIRCUIT**

MAJOR DEBORAH L. COLLINS*

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* Judge Advocate General's Department, United States Air Force. Presently assigned to the 48th Judge Advocate General's Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. B.S., 1982, Mississippi College, Clinton, Mississippi; J.D., 1988, University of Mississippi, Oxford, Mississippi. Formerly assigned as Medical Law Consultant, 89th Medical Group, Andrews Air Force Base, Maryland, 1997-1999; Medical Law Attorney, Air Force Legal Services Agency, Torts Claim and Litigation Division, Medical Law Branch, Arlington, Virginia, 1995-1997; Area Defense Counsel, Osan Air Base, Republic of Korea, 1994-1995; Chief of Claims, 51st Fighter Wing, Osan Air Base, Republic of Korea, 1993-1994; Chief, Claims, Environmental Law, Legal Assistance, Adverse Actions, Magistrate's Court, 7th Bomb Wing, Carswell Air Force Base, Fort Worth, Texas, 1991-1993. This paper was submitted in partial completion of the academic requirements of the 48th Judge Advocate General's Officer Graduate Course.

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I. Introduction

A. Overview

Once upon a time there was a beautiful young accountant named Goldilocks who worked for the Department of Defense (DoD). One day during the course of her number crunching, Goldilocks discovered that Evil Stepmother Construction Inc., a government contractor, overcharged the DoD for services on a routine basis. Goldilocks knew this was wrong because it cheated the DoD, as well as the happy townsfolk who gave the government money to spend. Goldilocks told her supervisor many times about her discovery. However, Mr. Supervisor was very busy and never did anything about Goldilocks' discovery. "Just finish your number crunching Goldilocks," said Mr. Supervisor. "I need that information for the annual report for the happy townsfolk." So Goldilocks faithfully calculated her data and the townspeople received their annual report. Time went by and Goldilocks worried still about the money that Evil Stepmother took from the DoD. "I must do something," she said. So Goldilocks filed a *qui tam* suit.¹ Later, as Goldilocks sat in the way-too-hard courthouse chair, a judge growled, "Somebody's been crunching numbers for a public report!" Another judge, who was sitting in a very soft chair muttered, "But it does not look like she derived her *qui tam* suit from the report." The first judge snarled, "Somebody is not the original source of her information and that somebody is sitting right here!" Goldilocks was so scared that she jumped out of the chair and ran out of the courtroom, never to be seen again.

The story you just read is not a fairytale. The plight of the modern day *qui tam* relator resembles the travails poor Goldilocks encountered in her search for that just right bowl of porridge and comfortable bed.² Depending on what circuit court the hapless relator finds herself in she is just as likely to end up with a mouthful of scalding porridge, or a bad back

¹ See Susan F. Fentin, Note, *The False Claims Act – Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. 3720(e)(4)*, 17 W. NEW ENG. L. REV. 255, 257 (1995). *Qui tam* suits are statutorily authorized actions that allow private citizens to file suit for the government. These actions allow for recovery of monies paid by the government because of fraud. The *qui tam* plaintiff is also referred to as a "relator." *Id.* at 257.

² Robert Southey, *Goldilocks and the Three Bears*, in A TREASURY OF BEDTIME STORIES 9-11 (1981).

from sleeping in a too small bed as she is of maintaining her *qui tam* action under the False Claims Act (FCA).³ Unlike Goldilocks' story the culprit for the *qui tam* relator is not a bunch of lackadaisical bears. The relator's culprit is the inconsistent meaning various circuit courts apply to the current statutory language. Specifically, the circuit courts disagree about the correct statutory interpretation of what a "public disclosure" is, and when is an action "based upon" a public disclosure.

B. Why the Differing Interpretations are a Matter of Concern

The FCA is an important statutory tool that allows the government to recover money obtained from it by fraudulent means. The Act not only gives the government a statutory

³ False Claims Act of 1863, 31 U.S.C.S. § 3729, 3730 (LEXIS 2000) (1986). § 3729 permits the government to recover civil penalties and treble damages from persons who knowingly present, or cause a false claim to be made against the government. Actions covered by 31 U.S.C.S. § 3729(a) include those taken by any person who:

- (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an Armed Forces of the United States a false or fraudulent claim for payment or approval;
- (1) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- (1) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
- (1) has possession, custody, or control of public property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- (1) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (1) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces who lawfully may not sell or pledge the property; or
- (1) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

Id. § 3729(a).

means of recovery, it also empowers private citizens to bring suits on behalf of the government.⁴ Since the most recent changes to the FCA in 1986, *qui tam* suits have recovered more than \$2.5 billion in fines and damages. In addition, since the 1986 Amendments went into affect the number of *qui tam* suits filed increased more than forty times the previous number of such suits.⁵ The amended *qui tam* provisions appear to be very successful not only as a method to recover government funds, but also as a means to deter fraud.⁶ Despite the success of the *qui tam* provisions there are concerns that the Act is not living-up to its full potential. The principal sponsors of the 1986 Amendments, Representative Berman and Senator Grassley, voiced their concern before Congress that some circuits courts interpret too restrictively what constitutes a public disclosure and who could be an original source.⁷ There is indeed inconsistency among the circuits involving the most recent amendments to the Act. Some circuits adopt what is best described as a too hard, restrictive Daddy Bear approach, the result of which excludes many would-be relators. Other

⁴ 31 U.S.C.S. § 3730(b)(1). § 3730(b)(1) provides that

[A] person may bring a civil action for violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

Id.

⁵ See Hon. Howard L. Berman, Remarks before the House of Representatives (Wed. July 14, 1999), *available at* <<http://thomas.loc.gov/cgi-bin>> (discussing concern about misapplication of the 1986 Amendments to the FCA).

⁶ *Id.* In his remarks before Congress, Mr. Berman cited statistics provided by former Chief Economist for the U.S. Senate Committee on Budget, William L. Stringer. Mr. Stringer estimated that in the first ten years the amount of fraud deterred by the 1986 Amendments was between \$35 and \$75 billion. He also estimated an additional savings of \$105 to \$210 billion over the next ten years. *Id.*

⁷ *Id.*

circuits are viewed as too soft Mother Bears that interpret the Act less restrictively which allows a larger category of relators to file suit.

At first glance, the differing judicial interpretations may not appear alarming. However, unsuspecting relators should beware because their story may not have a happy forever after ending. The relator facing a too hard, restrictive circuit court could be chased out of the courthouse as an improper *qui tam* plaintiff.⁸ Unless the relator qualifies as an original source of the publicly disclosed information upon which her suit is based, 31 U.S.C.

§ 3730(e)(4)(A) will deprive the court of jurisdiction to hear the suit.⁹ The question becomes

⁸ Southey, *supra* note 2. After entering the Bears' cottage, Goldilocks took it upon herself to sample their food and test out their furniture. Exhausted by her activities she fell asleep in Baby Bear's bed. It was there that the Bear family discovered her. Awakening, the Bears so startled Goldilocks that she jumped out of bed and ran out of the cottage, never to be seen by the Bears again. *Id.* at 11.

⁹ 31 U.S.C.S. § 3730(e) sets forth the jurisdictional aspect of *qui tam* suits. § 3730(e) provides that:

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

how does the *qui tam* plaintiff's circuit court interpret section 3730(e)(4)(A). This paper will discuss the approaches used by the various circuit courts interpreting key provisions of the Act. Specifically, it will address which circuit court correctly interprets the FCA. To accomplish this goal, Section II will first provide a brief historical overview of *qui tam* suits and the FCA. This will include the 1943 Amendments to the FCA. The remainder of Section II will focus on the 1986 Amendments and their legislative history. Next, Section III will address how the various circuit courts interpret the "based upon," and "public disclosure" language of the statute. Lastly, Section IV will analyze the current confusion among the circuits and discuss which interpretation fulfills the legislative intent of the Act.

II. Background

A. *Qui Tam's English Roots and Lincoln's Law*

The concept of *qui tam* suits is not a modern one.¹⁰ Although usually thought of as a response to contractor profiteering during the American Civil War, *qui tam* suits originated in

Id.

¹⁰ See Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U.L. REV. 935, 938. Despite its ancient heritage the *qui tam* action is not immune from attack. The United States Supreme Court is considering currently whether *qui tam* actions are constitutional. Barbara Yuill, *False Claims Act: High Court Hears Argument on Rights of Qui Tam Whistleblowers to Sue States*, Fed. Cont. Daily (BNA) (Nov. 30, 1999), available in LEXIS, New Library, BNAFCD file. The question is whether a relator lacks "standing" as required by Article III of the Constitution. On Nov. 29, 1999, the U.S. Supreme Court heard oral arguments concerning the constitutionality of *qui tam* suits. The matter initially involved a Second Circuit case, *Stevens v. Vermont*, 162 F.3d 195 (2d Cir. 1998), in which the relator, Jonathan Stevens, brought a *qui tam* suit against the Vermont Agency of Natural Resources. Stevens, an agency employee, asserted that the state of Vermont fraudulently billed the government for hours not worked by state employees. The issue before the Court was whether the definition of "persons" who could be sued under the FCA included states. If states were persons under the Act, did the 11th Amendment protect the states from *qui tam* actions. Yuill, *supra* note 10. In an unexpected move on 19 Nov. 1999, Justice Scalia issued a *sua sponte* order moving the matter beyond the issues originally presented. Justice Scalia requested

English common law prior to the signing of the Magna Carta.¹¹ The term *qui tam* is derived from the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur.*”

The literal translation is “[w]ho serves on behalf of the King as well as for himself.”¹² The early *qui tam* provisions had their share of problems. Because the focus of these actions was on rewarding the informer for successful prosecution rather than on compensating the injured plaintiff, many informers took advantage of the system.¹³ Colonial American courts adopted

arguments regarding the constitutionality of a *qui tam* relator to bring suit under Article III when the government elected not to intervene. Charles Tiefer, *Order in Qui Tam Case May Foretell a Scalia Surprise*, LEGAL TIMES, Nov. 29, 1999, available in LEXIS, News Library file. Justice Scalia’s challenge should not come as a great surprise. He does not favor citizen suit provisions as he exhibited in *Lujan v. Wildlife Defenders*, 504 U.S. 555 (1992). In *Lujan*, Justice Scalia, writing for the majority, stated that plaintiffs must show an injury in fact to have standing before the court. *Id.* The timing of the arguments before the Supreme Court closely follows the holding in a Fifth Circuit case that suits by *qui tam* relators acting without government intervention violated the Article II, “Take Care” clause. *See Constitution Bars Whistleblowers from Pursuing Action if Government Does Not Intervene, Fifth Circuit Declares*, 72 Fed. Cont. Rep. (BNA) No. 19, 596 (Nov. 22, 1999) (citing *Riley v. St. Luke’s Episcopal Hosp.*, No. 97-20948, 1999 U.S.App. LEXIS 29820 (5th Cir. Nov. 15, 1999)), available in LEXIS, New Library, BNAFCD file. The Fifth Circuit has agreed to rehear the case, however, oral arguments have been postponed pending the Supreme Court’s decision in *Stevens v. Vermont*. *See Supreme Court May Use Another Case For Qui Tam Constitutionality, Attorney Predicts*, 73 Fed. Cont. Rep. (BNA) No. 9, at 254 (Feb. 29, 2000). Even if the Supreme Court chooses not to address the issue of the constitutionality of *qui tam* suits in *Stevens*, it will have another opportunity to do so in the near future. A contractor in a Ninth Circuit case has petitioned the Court on this very issue. In *Parsons Corp. v. Oliver*, the contractor, Parsons, has launched a three-prong attack challenging the constitutionality of the FCA’s *qui tam* provisions. Specifically, Parsons’ petition requests that the Court determine whether the *qui tam* provisions of the FCA are unconstitutional pursuant to Article III in that the relator lacks standing; whether the provisions are unconstitutional under Article II because only properly appointed officers may conduct civil litigation to further the United States’ interest; and, whether the *qui tam* provisions violate the Take Care and Separation of Powers clauses. *See Supreme Court Again Asked to Review Constitutionality of Qui Tam Provisions*, 73 Fed. Cont. Rep. (BNA) No. 6, at 157 (Feb. 8, 2000), available in LEXIS, New Library file.

¹¹ See *supra* note 10, at 938. The English based version of the *qui tam* suit arose initially under common law and evolved into a statutory form. The statute allowed two types of potential plaintiffs to obtain damages, in addition to the fines recoverable by Parliament. These plaintiffs were the wronged party and the informer. *Id.* at 938, 939.

¹² *Id.* at 939.

¹³ *Id.* Parliament tried a wide range of methods to staunch the number of manipulative claims and to improve public support of *qui tam* actions. Initially Parliament banned outright *qui tam* suits brought by informers. This ban was ultimately lessened to strict statutes of limitations, limited venues, and penalizing individuals who abused the system. *Id.*

English common law to include the common law notion that an individual could recover monies for herself as well as the sovereign.¹⁴

For many years *qui tam* suits held little significance in the world of government contractor fraud. In fact, *qui tam* suits were virtually nonexistent during much of the nineteenth century.¹⁵ It was not until one of America's darkest periods that *qui tam* suits underwent a revival. Throughout the course of the Civil War, stories abounded of unscrupulous businessmen whose only concern was to make as much of a profit as possible with no thought of the safety of the soldiers on the field.¹⁶ In response, Congress enacted the FCA to combat contractor fraud and to encourage private citizens with knowledge of such nefarious acts to disclose that information. The first enactment of the FCA included a *qui tam* provision that allowed successful relators to keep half of the damages recovered plus costs.¹⁷

¹⁴ *Id.* at 940. Colonial American government incorporated numerous *qui tam* provisions into its statutes. Such *qui tam* actions included matters dealing with copyright infringement, import duties, and liquor duties. *Id.*

¹⁵ *Id.* The lack of *qui tam* suits at that time is attributed to the fact that state and federal agencies were more efficient at rooting out fraud. This coupled with statutory restrictions caused a significant decrease in the number of *qui tam* suits. *Id.*

¹⁶ Fentin, *supra* note 1, at 257. Businessmen who contracted with the Union Army performed such egregious acts as substituting lesser-valued products, such as sand for sugar, or non-functioning firearms, than what was actually contracted for. *Id.* (citing John T. Bose, Civil False Claims and Qui Tam Actions 1-3 (1993)).

¹⁷ Act of March 2, 1863, ch. 67, 12 Stat. 696 (amended by 31 U.S.C. §3720 (1986)). § 6 of the FCA provides:

That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

B. *The Hess Decision and the 1943 Amendments to the FCA*

Despite the potential windfall the FCA provided for a successful *qui tam* relator, the number of such privately instigated suits was few.¹⁸ The minimal use of this cause of action may be why Congress gave little attention to *qui tam* suits until government spending grew, thereby increasing the number of *qui tam* suits. The number of government contracts increased dramatically during the 1940s, and with that increase the possibility of contractor fraud also increased.¹⁹ Unfortunately, dishonest contractors were not the only individuals who saw a chance to make money. Opportunists also came in the form of *qui tam* relators. The original 1863 FCA *qui tam* provisions did not restrict the sources from which a relator could obtain her information. This allowed individuals to use information no matter the source, and still obtain a reward if the suit was successful. This type of suit became known as a “parasitic suit.” Ultimately, outrage concerning parasitic suits caused Congress to amend the FCA for the first time in its 120-year history following the Supreme Court’s decision in *Marcus v. Hess*.²⁰

Id. The FCA’s Congressional sponsor, Senator Howard, indicated that the Act’s underlying basis was “the old fashion idea of holding out a temptation . . . setting up a rouge to catch a rouge.” CONG. GLOBE, 37th Cong. 3d Sess. 956 (1863).

¹⁸ See Purcell, *supra* note 10, at 941.

¹⁹ See Fentin, *supra* note 1, at 258. The amount of profiteering and the number of government contracts is elastic. As one increases so does the other, therefore as the number of government contracts increases so does the number of potential *qui tam* suits. *Id.*

²⁰ 317 U.S. 537 (1943).

Marcus v. Hess involved the allegation that electrical contractors in the Pittsburgh area engaged in a collective bidding scheme involving certain Public Works Administration projects. Previously a grand jury had indicted Hess and his collaborators for defrauding the government. They entered pleas of *nolo contendere* and the court fined them \$54,000. Marcus then filed a *qui tam* action pursuant to the FCA.²¹ Both the contractors and the government challenged Marcus' status as a *qui tam* relator. They averred that the sole basis of the relator's suit was the previous indictment. Therefore, since Marcus contributed nothing to investigating the underlying fraud he should not profit from the work of others.²² The Court rejected the government and respondents' argument. It held that even if Marcus did not uncover the contractors' wrongdoing he contributed significantly to the litigation, thus fulfilling at least a portion of the Act's intent. Specifically, the Court noted that the relator's suit netted the government \$150,000 at great personal risk.²³ The Court determined

²¹ *Id.* at 539.

²² *Id.* at 545.

²³ *Id.* Remarking upon the argument that Marcus did not uncover the fraud, the court held, "Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed." *Id.* The court's inference is that one of the purposes of the FCA, even prior to 1943, was to encourage private citizens to pursue judicial action in the face of fraud. The *Hess* court noted, "[T]his recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of litigation." *Id.* at 545, 546. It is interesting to compare Marcus' argument with that of modern day would-be relators. Marcus was trying to overcome what was essentially an equity argument. Specifically that he was not receiving a windfall but had contributed to the ferreting out of fraud. *Qui tam* plaintiffs use this same argument today. However, they are not making an equity argument but attempting to qualify as an original source of the information that serves as the basis of their suit.

that neither the plain language of the statute, nor its legislative history precluded recovery by a parasitic relator such as *Marcus*.²⁴

The *Hess* decision roused Congress to action. Congress perceived that *Hess*-like parasitic suits enriched do-little relators who benefited from the work of others, yet contributed nothing in return. One proposal suggested eliminating *qui tam* suits altogether. However, *qui tam* proponents who realized their value in fighting fraud sought to preserve these actions.²⁵ The final draft amended the *qui tam* section from allowing “any person” to bring a suit, as the 1863 provisions allowed, to barring a relator suit based on evidence or information already in the government’s possession.²⁶ Congress believed the new *qui tam* provision struck a balance between preventing parasitic suits such as in *Marcus v. Hess*, while leaving the door open for honest relators.²⁷ Unfortunately, the 1943 Amendments to the FCA would become an impediment to the honest relators they sought to protect.

²⁴ *Id.* at 546. Pursuant to the FCA’s 1863 statutory language “any person” could make a *qui tam* suit. During Committee debates concerning that original language the Bill’s sponsor stated that he envisioned that even a D.A. could act as an informer. *Id.* In response to the government’s argument in *Marcus v. Hess* that such an outcome violated public policy against unjust enrichment, the Court simply noted that Congress drafted the statute being complained about. The inference being that if the problem was statutory, it was Congress’ responsibility to correct it. *Id.*

²⁵ Fentin, *supra* note 1, at 258. During the course of committee hearings the United States Attorney General, Francis Biddle, asked Congress to remove the provision for *qui tam* suits in its entirety. Despite the willingness of the House of Representatives to do so, the Senate expressed reservations. *Id.*

²⁶ Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608 (codified as amended at 31 U.S.C. 232 (1976)). The provision reads, “The court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based on information in the possession of the United States, or any agency, officer or employee thereof at the time such suit was brought. *Id.*

²⁷ Fentin, *supra* note 1, at 259. During committee hearings for the 1943 Amendments, Senator Van Nuys, Chairman of the Senate Judiciary Committee, indicated that the changes to the *qui tam* provisions would not bar an action by an honest informer. This belief was seconded by Representative Kefauver who opined “the average good American citizen . . . [who] has the information and he gives it to the Government, and the

B. The 1986 Berman-Grassley Amendments

The drafters of the 1943 Amendments to the FCA believed that the changes they made had tightened the *qui tam* provision to prevent parasitic relators from successfully filing suit. They believed, however, that even with the changes the provision was still flexible enough to reward honest relators. Their belief was incorrect. Approximately forty years later, the outcome in *Wisconsin v. Dean*²⁸ prompted Congress to reexamine who should qualify as a proper relator. In *Dean*, the state of Wisconsin, acting as a relator, filed a *qui tam* suit alleging Medicaid fraud by Dean. Prior to filing its FCA claim, the state submitted its report of Medicaid fraud to the Department of Health and Human Services pursuant to federal statute.²⁹ The court dismissed the case holding that Wisconsin was not a proper relator because the federal government already possessed the information upon which the state based its suit.³⁰

Government does not proceed in due course, provision is made here where he can get some compensation.” *Id.* at 259 n.36. Unfortunately, Representative Kefauver and Senator Van Nuys were overly optimistic, in that they mistakenly relied on an earlier draft of the Amendment that was not adopted in the final draft. Specifically, one Senate version included language that read, “In other words, if the Attorney General will not prosecute the suit within 6 months, any citizen should have the right to prosecute it if a fraud has been committed, regardless of the source of the information.” See Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 248 (Winter, 1995). However, the six-months language was subsequently omitted. *Id.* at 248.

²⁸ 729 F.2d 1100 (7th Cir. 1984).

²⁹ 42 U.S.C.A. §§ 1396-1396(p). Pursuant to receiving Title XIX Social Security funding, the receiving state must report any fraud and abuse information to the Health Care Financing Administration of the Department of Health and Human Services. *Id.*

³⁰ 729 F.2d at 1101. The holding in *Dean* ended with an honest relator finding himself barred from the courthouse contrary to the drafters’ intent.

On August 1, 1985, Senator Grassley introduced his proposed amendments to the FCA.³¹ This was partially in response to *Wisconsin v. Dean*, as well as the perception that the Act was stale and needed jump-starting. During committee hearings, legislators learned that a 1981 General Accounting Office Report estimated that contract fraud against the government would result in a loss of “between \$150 and \$200 million over the next two years.”³² The Department of Justice reported that as much as ten percent of the federal budget would be drained by contractor fraud.³³ Committee members believed one reason contract fraud was so pervasive was because contractors were not afraid of getting caught. They also believed that restrictive judicial decisions undermined the statute’s effectiveness.³⁴ The proposed amendments reflected Congress’ belief that “to combat fraud it was fundamental to obtain the cooperation of individuals who were either close observers or otherwise involved in

³¹ S. REP. NO. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5268.

³² *Id.* (quoting Hearings on White Collar Crime, Before the Senate Comm. on the Judiciary, 99th Cong. 2d Sess. (1985)).

³³ *Id.* (quoting Hearings on the Dept’s of State, Justice, and Commerce, Before the Subcomm. on the Dept’s of State, Justice, and Commerce, the Judiciary and Related Agencies of the House Comm. on Appropriations, 96th Cong. 2d Sess. (1980)). During the early 1980s defense industry giants, such as General Electric, General Dynamics, and Rockwell, were among those found guilty of defrauding the government. In addition, of the one hundred largest contractors, forty-five were under investigation. DoD contractors were not the only ones who were wrongfully lining their pockets. The Department of Health and Human Services tripled its fraud prosecution over a two-year period. See Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the False Claims Act*, 24 OHIO N.U. L. REV. 163, 166 n.13.

³⁴ *Id.* at 4, 7.

fraudulent activity.”³⁵ Congress determined that the lack of insider cooperation stemmed from a fear of job related reprisal, as well as a sense that nothing would be done even if reported.³⁶ In addition to employee concerns, Congress heard from government officials that the government alone could not fight contractor fraud. The Department of Defense Inspector General, Joseph Sherick, testified that the government’s resources paled in comparison with the legal resources available to contractors.³⁷ Therefore, in order to strengthen the government’s ability to recoup money lost to fraud, Congress sought to encourage private individuals to assist in the fight against fraud. To accomplish its goal, Congress promulgated numerous amendments to the FCA to include section 3730(e)(4)(A) and (B). This section provides that:

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General *or the person bringing the action is an original source of the information.*

³⁵ *Id.* at 4. During the course of committee hearings woeful whistleblowers such as Robert Wityczak testified of their experiences with government contractor fraud. Mr. Wityczak, a triple amputee veteran, told hearing members of how he felt stymied at his supervisors’ lack of interest when he told them of his findings of fraud. He believed that he was subsequently excluded from office meetings and assigned demeaning taskings in the hopes that he would quit. *Id.*

³⁶ *Id.* at 5 (quoting Report of the United States Merit Systems Protection Board (MSPB), *Blowing the Whistle in the Federal Government* (Oct. 1984). The MSPB’s report found that among employees who failed to report fraud, 53% cited the “belief that nothing would be done to correct the activity even if reported.” Thirty-seven percent cited fear of reprisal making it the second most cited reason. *Id.*

³⁷ *Id.* at 8 (quoting Hearings on Defense Procurement Law Enforcement, Before the Subcomm. on Defense Admin, Practice and Procedure, of the Senate Comm. on the Judiciary, 99th Cong. 1st Sess. (1985)) (testimony of Joseph Scherick). During the course of the hearing it was stated that “Federal auditors, investigators, and attorneys are forced to make ‘screening’ decisions based on resource factors . . . Allegations that could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.” *Id.*

(B) For purposes of this paragraph, “original source” means an individual who has *direct and independent knowledge* of the information on which the allegations are based and has *voluntarily provided the information to the Government* before filing an action under this section which is based on the information (emphasis added).³⁸

Congress believed that the newly drafted amendment would lower the jurisdictional bar first created by the 1943 Amendments to the FCA. This would allow more *qui tam* relators to file suit. In addition, Congress hoped the new statutory language would prevent unduly restrictive judicial decisions of who qualified as a *qui tam* relator. It was Congress’ intent to avoid another *Wisconsin v. Dean* situation where an honest relator found herself statutorily barred despite the fact she had sought out and found fraud. Unfortunately, the 1986 Amendments failed to live up to drafters’ vision.³⁹ The problem is that different circuits interpret key terms of the test very differently thereby creating divergent outcomes. Because of the different interpretations, a *qui tam* plaintiff could find herself stopped in her track in one circuit court, however she could successfully file suit in another circuit. The key terms at issue are “based upon” and “public disclosure.”

III. The Two-Prong Analysis Pursuant to 31 U.S.C. A. § 3170 (e)(4)(A) & (B): Prong I The “Based Upon” and “Public Disclosure” Elements

³⁸ False Claims Act of 1863, 31 U.S.C.S. § 3730 (LEXIS 2000) (1986).

³⁹ See Hon. Howard L. Berman, Remarks before the House of Representatives (Wed. July 14, 1999), available at <<http://thomas.loc.gov/cgi-bin>>. In his remarks to Congress, Congressman Berman stated that he and Senator Grassley were very worried that some courts misconstrued the meaning of 31 U.S.C. § 3730(e)(4). Specifically they worried that the courts were too narrowly interpreting the public disclosure bar. *Id.*

When Congress drafted section 3730(e)(4) of the 1986 Amendments to the FCA, it essentially created a new jurisdictional bar. This jurisdictional bar is a two-prong test and each prong has its own subsets, or elements. Prong I encompasses the “public disclosure” issue. When confronted with a *qui tam* suit, the first question asked is if there was a public disclosure. If there was a public disclosure then the court considers the second element. The second element asks if the suit was based upon the public disclosure. If the answer to both elements is “yes,” the test moves on to the second prong. This article focuses on the first prong of the jurisdictional bar, first analyzing the term “public disclosure” then moving to the second element, “based upon.”⁴⁰

A. Prong I: The Public Disclosure Element—Public Disclosure and Discovery

When facing the FCA’s jurisdictional bar, the first hurdle the *qui tam* relator must clear is whether the suit involved a public disclosure. Section 3730(e)(4)(A) clearly states that:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] *Accounting Office report, hearing, audit, or investigation, or from the news media*, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information (emphasis added).⁴¹

⁴⁰ 31 U.S.C.S. § 3730(e)(4)(A). Prong II consists of three subsets, or elements. Two of the elements determine if the *qui tam* relator was the original source of the publicly disclosed information she based her suit upon. The first element asks if the relator had direct knowledge of the information. The second element asks if she had independent knowledge of the information. The last element requires that the *qui tam* relator voluntarily disclose her information to the government. 31 U.S.C.S. § 3730(e)(4)(B).

⁴¹ 31 U.S.C.S. § 3730(e)(4)(A).

The difficulty facing a would-be relator is that the circuit courts do not agree what is, or is not a “public disclosure.” In their zeal to prevent undeserving relators from obtaining a windfall, the majority of circuit courts define “public disclosure” broadly. The practical effect of this broad definition is it raises the jurisdictional bar that the relator must cross. Faced with this higher bar, our relator may feel like Goldilocks did as she attempted to peer over the high brim of Daddy Bear’s bowl. The prospects of obtaining her goal may appear quite daunting.

The Third Circuit follows the majority of circuits in defining broadly what constitutes public disclosure. This broad interpretation raised the jurisdictional bar. The cumulative effect of this approach is it limits the pool of potential *qui tam* relators. An example of the Third Circuit’s definition of public disclosure is found in *Stinson v. Prudential Ins. Co.*⁴² In *Stinson*, the issue before the Third Circuit was whether information obtained via discovery in a previous civil action was “publicly disclosed” information within the meaning of the statute.⁴³ The relator argued on appeal that its suit was not jurisdictionally barred because

⁴² 944 F.2d 1149 (3rd Cir. 1991). The relator (a law firm) acted previously as legal counsel on the part of a Mr. Leonard against Provident Life and Accident Insurance. *Id.* at 1151. During the course of representing Mr. Leonard, the relator began to suspect that Provident shifted illegally its primary liability of claims from itself to Medicare, thereby violating the Tax Equity and Fiscal Responsibility Act of 1982. *Id.* Subsequently, Provident filed suit in state court seeking a declaratory judgment that its claims procedures were legitimate. *Id.* It was during this state proceeding that Stinson obtained the two memorandums, via discovery, that are the subject matter of the appeal. These memorandums contained information about other insurance companies’ claims processing procedure to include Prudential’s. *Id.*

⁴³ *Id.* at 1152. The lower level court dismissed the action after determining that the relator was not an “original source” of the information supporting the suit. The lower court found that the underlying information came exclusively from the Provident memorandum; therefore, the source was neither directly, nor independently gained of a public disclosure. *Id.* (citing *Stinson v. Prudential Ins. Co.*, 736 F. Supp. 614, 622 (D.N.J. 1990)).

information obtained during discovery in a civil matter was not public disclosed as intended by the statute. Specifically, Stinson argued that the statute's use of the term "civil action" was not supposed to be so broadly construed to include a "civil proceeding" or "civil litigation."⁴⁴ The appellate court rejected Stinson's argument. The Third Circuit noted that the language of the statute referred to both civil and criminal hearings in the same manner. If it accepted Stinson's argument that the statute did not intend that a civil hearing include a civil proceeding or a civil litigation, then a criminal hearing would not include an indictment proceeding. Such an approach would permit a *Marcus v. Hess* type outcome in which information obtained from a criminal indictment could serve as the basis of a successful *qui tam* suit. The Third Circuit held that to avoid such a situation, the reading of subsection 3730(e)(4)(A) must be broad enough to cover a wide range of legal proceedings.⁴⁵ The court reasoned that Congress wrote the statute broadly to prevent suits based on matters susceptible to public access. It further reasoned that it did not matter whether the public ever tried to access the information. Therefore, the *Stinson* court held that information capable of being accessed by the public was publicly disclosed even if it is never accessed.⁴⁶ The court based its holding on Federal Rules of Civil Procedure 5(d) that requires filing of discovery material

⁴⁴ *Id.* This was one of three theories asserted by the relator that its suit was not jurisdictionally barred. The relator also argued that the jurisdictional bar was to apply only when the government made the public disclosure. *Id.* In the alternative Stinson argued that even if discovery was tantamount to a public disclosure, it also contributed to that information by other means. *Id.*

⁴⁵ *Id.* at 1153, 1155.

⁴⁶ *Id.* at 1155. *But see id.* at 1162. In the dissent, Judge Scirica rejected the majority's holding that information potentially accessible by the public was publicly disclosed. He stated, "I would find that public disclosure did not occur until . . . actually disclosed to the public." *Id.* He noted, "This suit is barred under the majority opinion even though it could have proceeded under the restrictive pre-1943 law that Congress intended to liberalize." *Id.*

in the absence of a protective order issued by the court thereby making such information potentially accessible by others. The court was not swayed by the fact that the applicable local rules did not require the filing of discovery.⁴⁷ The court opined that no one would expect Congress to analyze all the local rules. Therefore, it was unwilling to limit its understanding of what constituted a public disclosure simply because the state rules differed. The majority reasoned that the FCA was a federal statute and as such the Federal Rules of Civil Procedure controlled.⁴⁸

Although the majority of circuit courts consider information obtained during discovery to be publicly disclosed information pursuant to section 3730(e)(4)(A), this is not a unanimous position. In *Mathews v. Bank of Farmington*, the Seventh Circuit held that information obtained during discovery was not publicly disclosed information.⁴⁹ The Seventh Circuit expressly rejected the finding in *Stinson v. Prudential*, that public disclosure pursuant to the FCA included information that was potentially discoverable. The *Mathews* court held that the plain meaning of the term was information that was in the full view of the public. It did not mean information obscured from the public's sight unless otherwise ferreted out. The

⁴⁷ *Id.* at 1157.

⁴⁸ *Id.* at 1159.

⁴⁹ *Mathews v. Bank of Farmington*, 166 F.3d 853, 859 (7th Cir. 1999). In 1993, Eunice Mathews acted as a guarantor of her son's farm loans with the Bank of Farmington. The bank subsequently obtained an FmHA guaranty on the same loans but failed to disclose to the FmHA that Mrs. Mathews was also a guarantor. Mrs. Mathews' son defaulted on the loans. The bank filed a claim with the FmHA to recover its losses and was paid by the FmHA. *Id.* at 856. The bank brought suit against Mrs. Mathews in state court to enforce her guaranty of the same loan. During the course of discovery, Mrs. Mathews' attorney discovered the FmHA guaranty and the fact that the bank had not disclosed his client's guaranty of the loan as required by law. *Id.* at 857. When confronted for the first time with the question of discovery and public disclosure pursuant to the FCA, the lower court relied on the Third Circuit's holding in *Stinson v. Prudential*. *Id.*

Mathews court reasoned that discovery proceedings were not conducted in public. Therefore, information obtained during the discovery process was not in the public's view. The court concluded saying that if information was publicly disclosed because the public might someday access it convoluted the plain meaning of the statute.⁵⁰ Despite the fact that the *Mathews* court rejected the notion that discovery was publicly disclosed information; it nonetheless found that the basis of Mrs. Mathews' *qui tam* suit was publicly disclosed. It also found that Mrs. Mathews was not the original source of that information and her suit barred by the FCA.⁵¹

B. Prong I: The "Based Upon" Element—A Derived From or Supported by Test?

⁵⁰ *Id.* at 859 (citing 12 Oxford English Dictionary, 2d ed. 780 (1989)). It should be noted that in both *Mathews* and *Stinson v. Prudential* the local court rules did not require that discovery be filed with the court. *Stinson v. Prudential, Co.*, 944 F.2d 1149, 1157 (3rd Cir. 1991). *Mathews v. Bank of Farmington*, 166 F.3d at 857.

⁵¹ *Id.* at 861. The court noted that Mrs. Mathews' attorney subpoenaed Mr. Victor Rhea, an FmHA employee who worked with the bank on guaranty matters, during the course of the civil litigation. Mr. Rhea in turn contacted the Bank of Farmington to find out what was going on. It was then that one of the bank's loan officers told Mr. Rhea for the first time about Mrs. Mathews guaranty of her son's loans. The FmHA and the bank began negotiations concerning the FmHA's previous payments on said loans. *Id.* 857. The court held that the communication between the loan officer and Mr. Rhea was a public disclosure because Mr. Rhea was a "competent public official" whose duties included oversight of loans and claims. *Id.* at 861. The debate over what is public disclosure is not limited to discovery. See, e.g., *Jones v. Horizon Healthcare Corp.*, No.94-CV-71573-DT, 1997 U.S. Dist. LEXIS 12108 (6th Cir. 1997). Jones worked for Horizon as a patient care services consultant. Her responsibilities included reviewing Medicare claims. Jones alleged that she informed Horizon higher-ups of fraudulent claims she discovered but nothing was done. Horizon eventually moved its claims processing department to another state. Jones was fired for poor work performance. *Id.* Jones filed her whistleblower retaliatory discharge suit in federal court in 1993. She subsequently filed her *qui tam* action in 1994. The court dismissed Jones' *qui tam* suit as jurisdictionally barred pursuant to § 3730(e)(4)(A). The court held that because Jones publicly disclosed the basis of her *qui tam* suit in her wrongful discharge suit she was no longer the original source of that information. *Id.* See also *Ragsdale v. Rubbermaid*, 193 F.3d 1235 (11th Cir. 1999). The Eleventh Circuit reached the same conclusion involving a similar scenario as *Jones*. In *Ragsdale v. Rubbermaid, Inc.*, there was a flip-flop of the *Jones* facts. In *Ragsdale* the relator first filed his *qui tam* suit alleging that his former employer, Rubbermaid, misbilled the government. The *qui tam* suit was settled. *Ragsdale* then filed a suit pursuant to § 3730(h) asserting that his employer retaliated against him for whistleblowing. *Id.* at 1237. The court determined that the doctrine of *res judicata* barred the whistleblower suit. *Id.* at 1240. The *Ragsdale* court used a "transactional approach" finding that both claims were "based upon the same factual predicate and contain the same cause of action for *res judicata* purposes. *Id.* at 1237.

Once a public disclosure is found pursuant to 31 U.S.C. § 3730(e)(4)(A), a second question must be asked. That question is whether or not the *qui tam* suit is “based upon” the public disclosure. This particular element is the most contentious among the circuit courts. There are essentially two schools of thought about what is meant by “based upon,” and yet another circuit claiming to have a third approach.

1. “Based Upon”—The Minority “Derived From” Definition

The circuit courts differ greatly in implementing the relator provisions of the FCA, however, no term is more divergent than the “based upon” language of section 3730(e)(4)(A). The Fourth Circuit adopts the minority “derived from” test to determine if an action is “based upon a public disclosure.” The impact of the “derived from” standard is that it allows a greater number of *qui tam* plaintiffs to clear the jurisdictional hurdle. This approach leaves the majority of circuit courts viewing the minority much like Mother Bear’s chair in our fairytale. They assert that this too soft definition of “based upon” swallows-up the FCA’s intent much like an overstuffed chair swallows-up the person sitting in it. This has caused at least one court to criticize the Fourth Circuit as rendering the public disclosure bar largely superfluous.⁵² The case setting forth the Fourth Circuit’s renegade position is

⁵² *Mistick v. Hous. Auth. of the City of Pittsburgh*, No. 97-3248, 1999 U.S. App. LEXIS 17935 (1999). The Fourth Circuit is decidedly a soft, cuddly Mother Bear type circuit when compared to the other circuits. The remainder of the circuits follow the majority “supported by” standard. Prior to the Fourth Circuit’s maverick stance the unanimous approach of all the circuits was that a *qui tam* action was based upon a public disclosure if the allegations in a *qui tam* suit were substantially similar to a public disclosure. They considered how the relator acquired the information was irrelevant. See Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 42 PUB. CONT. L.J., 477, 491 (Summer, 1995).

Siller v. Becton Dickinson.⁵³ Becton Dickinson (BD) terminated its distributorship agreement with Scientific Supply Inc. (SSI) in 1987. SSI filed suit in Texas state court alleging that BD wrongfully terminated the agreement because it feared that if SSI successfully sold BD products to the government, it would reveal that BD overcharged the government in its direct sales.⁵⁴ Siller filed his *qui tam* action in January of 1991. The United States District Court, for the District of Maryland, granted BD's motion to dismiss the suit because it was "based upon" a public disclosure, thus barred in accordance with 31 U.S.C. § 3730(e)(4)(A).⁵⁵ Siller asserted that although his *qui tam* suit bore substantial similarities to the prior SSI/BD litigation, he did not base his suit upon information obtained from that previous civil matter. Siller argued that unless a relator derived his knowledge of fraud from the public disclosure, the *qui tam* action was not based upon that disclosure.⁵⁶ In opposition to Siller's argument, BD asserted that it was irrelevant under the statute from what

⁵³ 21 F.3d 1339, 1348 (4th Cir. 1994). The case involved the *qui tam* suit of David Siller, an employee of his brother's medical supply distributorship, SSI. SSI's inventory included BD's merchandise. *Id.* at 1440.

⁵⁴ *Id.* at 1341. The parties settled the suit by confidential settlement. Pursuant to the terms of the settlement, Ruben Siller, the president of SSI, would not disclose the existence or terms of his settlement with BD. Theoretically this would preclude anyone else of learning about BD's supposedly fraudulent activity. The settlement was not binding to David Siller. *Id.*

⁵⁵ *Id.* Siller asserted that he did not read SSI's state court complaint until BD filed the motion to dismiss his *qui tam* action. He asserted that he conducted his own investigation into BD's overcharging after his discovery of the practice during his employment with SSI. *Id.* at 1340. Dismissal of Siller's *qui tam* suit was a win-win situation for Becton-Dickinson. In addition to dismissing Siller's *qui tam* suit the lower court also dismissed the government as a party plaintiff pursuant to 31 U.S.C. § 3730(b)(2)-(b)(4). 31 U.S.C. § 3730(b)(2) requires the relator to provide a copy of the complaint and material evidence to the government. The complaint is filed *in camera* and remains under seal for at least 60 days. The government may elect to intervene and proceed within 60 days after it receives both the complaint and the evidence. 31 U.S.C. § 3730(b)(4) states, "Before the expiration of the 60-day period or any extension . . . the government shall (A) proceed . . . notify the court that it declines to take over the action . . ." In *Siller* the government took over twenty-one months to decide to intervene. *Id.* at 1341. The lower court determined that because the government had not complied with the statutory procedures it could not intervene. *Id.*

⁵⁶ *Id.* at 1347.

particular source the relator obtained his information. The respondent argued that the statute required dismissal if the allegations in the suit mirrored information in a previous public disclosure.⁵⁷ The *Siller* court believed that it struck a balance between Congress' intent to promote privatization of the statute via civilian suits, with its desire to prevent parasitic *qui tam* actions. The court concurred with *Siller* that the only fair reading of the statute was that "based upon" meant "derived from."⁵⁸ In addition, the court held that a suit was not parasitic if it only contained allegations that were similar, even identical, to publicly disclosed information. It reasoned that a parasitic suit derives its premise solely from a public disclosure.⁵⁹

The *Siller* court rejected the logic used by two of majority's circuit courts that had interpreted the term "based upon." Specifically, it found the Second Circuit's interpretation of the term flawed. The Second Circuit espoused its interpretation of the term "based upon" in *John Doe Corp v. John Doe*.⁶⁰ The *Siller* court found that the *John Doe* court erred in

⁵⁷ *Id.*

⁵⁸ *Id.* at 1348. The court held that the phrase "based upon" was "susceptible of a straight forward textual exegesis . . . to 'base upon' means to 'use as a basis for.'" *Id.* (referencing Webster's Third New Int'l Dict. 180 (1986) (definition No. 2 of verb base)). Restricting the "based upon" language to "a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based" was common sense to the court. *Id.* at 1348.

⁵⁹ *Id.*

⁶⁰ 960 F.2d 318 (2nd Cir.1992). Specifically the *Siller*'s court cited *John Doe Corp v. John Doe* as standing for the Second Circuit's proposition that a relator did not have to derive his information from a public disclosure for his suit to be based upon that public disclosure. *Siller v. Becton Dickinson*, 21 F.3d at 1348 (citing *John Doe Corp., v. John Doe*, 960 F.2d at 324). The court opined that the *John Doe* court misapplied the holding in *Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990), when it arrived at its meaning of the phrase "based upon." *Id.*

defining “based upon,” because the case law it relied upon did not support its holding. Specifically, the case *John Doe* cited never addressed the question of what “based upon” meant. Therefore, the *Siller* court believed the Second Circuit’s reading of the term was incorrect.⁶¹ The *Siller* court also rejected the logic used by the Tenth Circuit to define “based upon.” In *Precision v. Koch Indus.*, the Tenth Circuit defined “based upon” as meaning “supported by.” The *Siller* court held that the Tenth Circuit “badly asserts that as a ‘manner of common usage, the phrase based upon is properly understood to mean supported by’ . . . We are unfamiliar with any usage, let alone a common one or a dictionary definition, that suggests that ‘based upon’ can mean ‘supported by.’”⁶² Since the Tenth Circuit’s definition lacked any credible basis, the *Siller* court rejected that interpretation.

⁶¹ *Siller v. Becton Dickinson & Co.*, 21 F.3d at 1349. The *Siller* court held, “[T]he LILC Court itself never addressed the particular question of when a *qui tam* action is ‘based upon’ a public disclosure . . . there was no dispute the suit was based upon publicly disclosed allegations or transactions; the only issue was whether the relator was the ‘original source.’” *Id.* (referencing *Dick v. Long Island Lighting*, 912 F.2d 13, 16 (2nd Cir. 1990)).

⁶² *Id.* at 1349 (citing *Precision Co., v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992)). The Fourth Circuit has a strong supporter in Robert L. Vogel, a staunch defender of the rights of *qui tam* plaintiffs. He is currently in a solo private practice in Washington D.C. where he specializes in *qui tam* suits. He has been involved in approximately twenty such suits most notably *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994). He was the relator’s counsel in that case. Mr. Vogel has written several articles about the 1986 *qui tam* provisions to include, *The Public Disclosure Bar Against Qui Tam Suits*, 42 PUB. CONT. L.J. 477, 509-510 (Summer, 1995). Prior to entering into private practice in 1990, Mr. Vogel was a trial attorney in the commercial fraud section of the Department of Justice’s Civil Litigation Branch from 1987-1990. He received his J.D. from Stanford in 1985. Robert Vogel, biography (visited Feb. 11, 1999) <<http://www.fraudbusters.com>>. It is Mr. Vogel’s opinion that only the minority approach satisfies Congress’ desire to make *qui tam* suits more attractive for the average citizen to pursue. In support of his thesis, Mr. Vogel points to *Saudi Arabia v. Nelson*, in which the Supreme Court interpreted the phrase “based upon” as it appeared in another statute. Vogel, *supra* note 52, at 499 (referencing *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993)). The *Nelson* case involved a statute that provided for federal jurisdiction against a foreign state in any case ‘in which the action is based upon a commercial activity carried on in the United States by a foreign state.’” *Id.* Because of the lack of legislative history, the Supreme Court elected to use the dictionary definition of “based upon” which was information that served as the basis or foundation of a claim. *Id.* Mr. Vogel asserts that the minority’s common sense definition of the phrase “based upon” mirrors the logic used by the Supreme Court to interpret the same language, albeit in a different statute. Therefore, the minority definition is the correct definition. *Id.*

2. The Majority's Restrictive Approach—The “Supported By” Definition

The Fourth circuit's minority interpretation of “based upon” encourages a potential *qui tam* relator to file suit because it lowers the FCA's jurisdictional bar. Unfortunately for the would-be relator, the majority of circuit courts interpret “based upon” very restrictively. This approach raises the bar making it harder for the *qui tam* relator to remain in court. The landmark case setting forth the majority's definition of “based upon” is the Tenth Circuit's holding in *Precision v. Koch*.⁶³ On appeal the relator, Koch, argued that the FCA only barred *qui tam* suits solely based on publicly disclosed information. The Tenth Circuit rejected that argument. The *Precision* court found the FCA's language to be plain and unambiguous. It held that it was common knowledge that the plain meaning of “based upon” was “supported by.”⁶⁴ The court refused to read the word “solely” into the statute since Congress did not draft the statute to include it. The Tenth Circuit reasoned that if it read the word solely into the statute it would unlawfully expand federal jurisdiction by permitting relators to bypass the original source prong of the statute.⁶⁵ The *Precision* court attempted to bolster its

⁶³ 971 F.2d 548 (10th Cir. 1992). *Precision* filed a *qui tam* suit alleging Koch Pipeline defrauded the government by “deliberate and systematic mismeasurement of crude and ground gas produced on Federal and Indian lands.” *Id.* at 550. The lower court found that *Precision*'s suit was barred for lack of jurisdiction because the “complaint was based, at least in part, upon publicly disclosed information . . . (of which) *Precision* was not the original source.” *Id.* at 551.

⁶⁴ *Id.* The *Precision* court apparently understood the definition to be so commonly understood that it did not need to cite any reference for its definition. *Id.*

⁶⁵ *Id.* at 552. The court stated that it had to balance its responsibility to use the “plain language of the statute” with its responsibility to “resolve[d] doubts] against federal jurisdiction.” *Id.* Therefore, by defining “based upon” as “supported by” it limited the number of *qui tam* relators that would make it to the second prong of the test, thereby reducing the number of potential federal suits. *Id.*

decision by rationalizing that its definition not only fulfilled the statute's intent, but it served judicial economy by limiting the amount of evidence courts would otherwise have to consider.⁶⁶

3. *Somewhere in the Middle—Betwixt The “Derived From” and “Supported By” Definitions*

The Third Circuit adopts a definition it calls the middle ground between the overly soft, minority approach of the Fourth Circuit, and the restrictive approach followed by the majority of circuits. The Third Circuit interprets “based upon” as meaning that a suit is based upon a public disclosure if the public disclosure has the essential elements of the *qui tam* suit.⁶⁷ Although the Third Circuit believes its definition makes it the “just right circuit,” in reality its approach closely resembles the majority's definition.

The Third Circuit believes that *Mistick v. Hous. Auth. Of the City of Pittsburgh* establishes the middle ground approach between the minority's “derived from” standard and the majority's “supported by” standard.⁶⁸ In *Mistick*, the Third Circuit easily cleared the public

⁶⁶ *Id.* at 552, 553. The court noted that the *qui tam* provision had two “basic goals: 1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud.” *Id.* at 552. It opined, “[T]he threshold ‘based upon’ analysis is intended to be a quick trigger for the more exacting original source analysis . . . If a suit was barred only if it was based on the public disclosure then there would be no need to entertain the second prong.” *Id.* In addition, the court held that to require a court to slough through all the evidence to quantify the basis on the plaintiff's suit was adverse to its time, thus not judicially economical. *Id.* at 553.

⁶⁷ See *supra* text accompanying note 3.

⁶⁸ *Mistick v. Hous. Auth. of the City of Pittsburgh*, No. 97-3248, 1999 U.S. App. LEXIS 17935 (1999). *Mistick* involved a *qui tam* suit in which the relator obtained some of his information from a Freedom of Information

disclosure hurdle. It then tackled the issue of when a suit is “based upon” publicly disclosed information. The *Mistick* court noted the diverseness of the minority and majority’s definitions. It concurred with the Fourth Circuit’s minority opinion that the common meaning of the phrase “based upon” did not include “supported by.” However, despite agreeing with the minority definition, the *Mistick* court agreed with the majority approach that to give the phrase such a meaning would render the second prong of the statute superfluous.⁶⁹ In an effort to resolve its dilemma, the court held that the statute was poorly written and the language ambiguous.⁷⁰ The court reasoned that in light of the ambiguous language of the statute it was best to follow the majority definition so as not to render the remainder of the section superfluous. Therefore, the Third Circuit held that a suit was “based upon” a public disclosure, if a public disclosure laid out the same allegations contained in a *qui tam* suit.⁷¹ Although the Third Circuit describes its interpretation of section 3730(e)(4)(A) as more lenient than the majority definition that distinction is unclear. The

Act Request (FOIA). *Id.* at *11. It should be noted that the Third Circuit’s case law clearly considers information obtained via FOIA to be publicly disclosed information. *Id.* at *15.

⁶⁹ *Id.* at *28, 29.

⁷⁰ *Id.* at *30. The *Mistick* court described itself as “confronted with a clash between two textual arguments concerning the meaning . . . of the phrase ‘base upon’ . . .” *Id.* The court noted that the statute did “not reflect careful drafting or a precise use of language.” *Id.* at *32. As evidence of Congress’ poor drafting of the statute the court marked several errors to include referring to the “General Account Office as the Government Account Office.” *Id.* Having concluded the statute was poorly drafted, the court held, “[Due to] this lack of precision we are hesitant to attach too much significance to a fine parsing of the syntax of § 3730(e)(4)(A).” Therefore, the court deemed the section to be ambiguous. *Id.* at *33. It is interesting to note that the Third Circuit relies on the logic used by the majority, as announced in *Precision v. Koch*, because the statute’s language was ambiguous. In *Precision*, however, the Tenth Circuit arrived at its definition of the statute after concluding that the FCA’s language was unambiguous.

⁷¹ *Id.* at *33. In the dissent, Chief Judge Becker rejected the majority’s dismissal of the plain meaning of “based upon.” *Id.* at *398. He stated, “[W]hether or not Congress was sloppy in its choice of certain words, there is nothing ambiguous about the phrase ‘based upon.’” *Id.* at *397-398.

majority's "supported by" definition of "based upon" bars any suit in which the allegations in the suit mirror a public disclosure.⁷² The Third Circuit interprets "based upon" as meaning that the pertinent facts of a *qui tam* suit are also contained in a public disclosure. It is difficult to distinguish between the majority's definition and the Third Circuit's "contains the same elements" test. The two approaches appear to be the same.

Mistick is not a Third Circuit aberration, but represents the circuit's standard interpretation of the FCA's jurisdictional bar. Recently, however, in *Waris v. Staff Builders, Inc.*⁷³, the Third Circuit took the *Mistick* definition of "based upon" and added a twist. Waris, the owner of a home health care business, sold his business to a subsidiary of Staff Builders. Pursuant to the purchase agreement between the two, Staff Builders retained Waris as a consultant.⁷⁴ The relationship soured quickly after Waris refused to alter an invoice he gave to Staff Builders for services rendered. Staff Builders wanted the bill changes so they could submit it to Medicaid for reimbursement. Waris filed a *qui tam* suit alleging that Staff Builders subsequently fabricated a memo to collect Medicaid funds reimbursing them for Waris' services. He used his invoice as evidence of the alleged fraud.⁷⁵ After the lower

⁷² Precision v. Koch, 971 F.2d 548, 552 (10th Cir. 1992).

⁷³ Waris v. Staff Builders, No. 96-1969, 1999 U.S. Dist. LEXIS 15247 (E.D. Pa. Oct. 4, 1999).

⁷⁴ *Id.* Pursuant to their business agreement Waris would provide a minimum of 1,000 hours of consulting services annually for two years. Staff Builders in turn would pay him \$105,000 annually. *Id.* at *2.

⁷⁵ *Id.* In January of 1994, Waris performed a market study at Staff Builder's request. The invoice submitted by Waris to Staff Builders was returned with the comment that "it could not be used." Waris refused Staff Builder's request to reword the invoice. After that Staff Builders rarely utilized his services. However, he received monies totally \$210,00 over the course of the contract. *Id.* at *3. Waris' evidence of fraud by Staff Builders consisted of the January invoice. *Id.* at *4.

court dismissed his *qui tam* suit, Waris amended his complaint to incorporate new information, to include a Department of Health and Human Services Inspector General (IG) audit of Staff Builders for fiscal year 1994.⁷⁶ Concluding that the IG audit was a public disclosure, the Third Circuit turned its attention to whether the *qui tam* suit was “based upon” the audit.⁷⁷ The *Waris* court acknowledged the fact that the relator filed his *qui tam* action two years before the IG published its audit. The Third Circuit, however, using the *Mistick* definition of “based upon” found itself forced to bar the suit.⁷⁸ It opined that timing was irrelevant, as long as the public disclosure contained the essential elements of the *qui tam* suit.⁷⁹

IV. The False Claim Act's *Qui Tam* Provisions—Is There A Just Right Circuit, or is it Just a Fairy Tale?

⁷⁶ *Id.* *6. The lower court dismissed the suit “for failure to plead allegations of fraud with sufficient particularity.” *Id.*

⁷⁷ *Id.* at *9. The court espoused a four question test to determine if Waris passed Prong I of the statute. The analysis was as follows: “1). Are there any ‘public disclosures’ at work in this claim; 2). If so, do they disclose ‘allegations’ of fraud or fraudulent ‘transactions’; 3) If so, is the plaintiff’s claim ‘based upon’ these ‘allegations or transactions’; and, 4) Is the plaintiff an ‘original source’ of these ‘allegations or transactions.’” *Id.* at *9. The court identified quickly the IG audit as “a paradigmatic example of an ‘administrative audit’ . . . thus barred by § 3730 (e)(4)(A) [as a public disclosure].” *Id.* at *11.

⁷⁸ *Id.* at *18. The definition of “based upon” set forth in *Mistick* is, whether “the disclosure sets out . . . all the essential elements of the *qui tam* action’s claims.” *Id.*

⁷⁹ *Id.* at *18, *19. The twist that *Waris* added was the timing of the disclosure. According to the Third Circuit's opinion when the matter was disclosed is irrelevant in the event the *qui tam* suit and the public disclosure contained the same essential elements. Therefore, whether the public disclosure was a year before, or a year after filing of the suit the result would be the same. The suit is jurisdictionally barred. *Id.* at *19.

The majority and minority of circuits have clearly different views on how high or low to place the FCA's jurisdictional bar. Regardless of the difference in their interpretations of "based upon," and "public disclosure," they both believe that their approach satisfies the intent behind the 1986 Amendments to the FCA. The majority and minority agree that the purpose underlying the amendments was two-fold: to encourage private individuals to file suit against contractors defrauding the government; and to supplement the government's limited resources.⁸⁰ Since they both agree on the legislative intent behind the FCA, it is difficult to understand why they read the statute so differently. The question that arises is which of the two views is correct, or is the stage set for a new, just right circuit's interpretation to emerge? There is no need for a new interpretation. Considering the statute's language and the underlying Congressional intent, it is clear that the minority approach is the correct one.

To understand why the minority interprets correctly the FCA's 1986 Amendments, the reader must understand what was amended. Congress' obvious concern was the limits placed upon whom could be a *qui tam* relator pursuant to the FCA as amended in 1943. Congress amended the FCA in 1943 in a knee-jerk reaction to *Marcus v. Hess*.⁸¹ It abhorred the idea

⁸⁰ See Salcido, *supra* note 27, at 257. Mr. Salcido notes the following:

From its inception in 1863, the *qui tam* provisions have been designed to further generally these ends:

- To provide a sufficient incentive to spur private individuals knowledgeable about fraud to disclose that information to the Government;
- To stem governmental complacency or override instances where agencies have been co-opted by those they are created to police;
- To serve as a political check against governmental corruption; and
- To supplement scarce federal resources.

Id.

⁸¹ See Robert Salcido, *supra* note 27, at 242. Mr. Salcido provides an excellent analysis of the FCA and how the Act, specifically the jurisdictional bar, reflected the drafters' view of government and fraud at their respective times. He notes that when Congress enacted the FCA in 1863, the Act did not have a jurisdictional

that someone, who did little, if anything, should reap a large and undeserved reward.⁸²

Therefore, to prevent a parasitic relator such as Marcus from becoming unjustly enriched, Congress raised the jurisdictional bar by prohibiting suits based on information already in the government's possession.⁸³ This raising of the bar resulted in a dramatic decrease in the number of *qui tam* suits filed.⁸⁴ This was partially due to the fact that the FCA's 1943 Amendments barred non-parasitic relators if they provided the government their information prior to filing their suit.⁸⁵ In 1986, Congress sought to revitalize the FCA by lowering the jurisdictional bar, thereby potentially increasing the number of *qui tam* suits.⁸⁶ The second problem that the 1986 Congress attempted to solve was not so obvious. It was the insidious nature of contractor fraud. Congress believed that contractor fraud was so far-flung and

bar. At that time there were no federal investigative agencies to root out fraud, therefore the FCA's *qui tam* provision was vital to supplementing the government's virtually nonexistent law enforcement resources. Therefore, to encourage private citizens to participate the Act provided them a generous compensation. *Id.* at 258. When Congress amended the Act in 1943, it essentially eliminated the jurisdictional bar. Mr. Salcido opines that what prompted this change was a feeling of confidence in the government's ability to enforce the law. *Id.* Lastly, when Congress undertook to amend the FCA in 1986, it did so in the face of large government spending coupled with seemingly pervasive contractor fraud. Because of Congress' concern that the government was unable to detect fraud, or enforce its laws, it sought to lower the jurisdictional bar and once again encourage private suits. *Id.*

⁸² See Purcell, *supra* note 10, at 939. That has been a longstanding weakness with the *qui tam* provisions. To assuage the public's outcry against manipulation of the English common law *qui tam* statutes, Parliament banned such suits. That solution proved unacceptable and Parliament reinstituted *qui tam* suits with some limitations. *Id.*

⁸³ Salcido, *supra* note 27, at 247. Mr. Salcido asserts that the drafters of the 1943 Amendments rejected the FCA's original *qui tam* provision because they believed that the government had the ability and integrity to fight fraud. By raising the bar it was assuming that if the government had the information it would pursue the matter accordingly. *Id.*

⁸⁴ See Morgan & Popham, *supra* note 33, at 170. The authors describe the 1943 Amendments to the FCA as contributing to an anti-*qui tam* bias that almost ended this type of suit. *Id.*

⁸⁵ See Salcido, *supra* note 27, at 248.

⁸⁶ See *id.* at 248.

engrained in some industrial circles that government resources alone could not investigate or prosecute it effectively.⁸⁷ To solve this dilemma, Congress sought to include private citizens in ferreting out and prosecuting fraud. By lowering the jurisdictional bar Congress enabled *qui tam* plaintiffs easy access to the courtroom.

The minority's interpretation of the term "public disclosure" fulfills the intent of the 1986 Amendments to the FCA. As evidenced in *Mathews v. Bank of Farmington*,⁸⁸ the minority does not interpret the phrase "public disclosure" as broadly as the majority of circuits do. The majority's view of "public disclosure" includes information actually disclosed to the public, as well as information potentially accessible by the public.⁸⁹ By giving public disclosure such an expansive definition, the majority has not lowered the FCA's jurisdictional bar, but has raised it. As noted by Judge Scirica, the lone dissenter in *Stinson v. Prudential*, the majority's interpretation of public disclosure was more restrictive than the pre-1943 statutory language.⁹⁰

Judge Scirica is not alone in criticizing the majority's definition of what is a public disclosure. Robert Vogel shares Judge Scirica's opinion. Specifically, they focus on the

⁸⁷ *Id.*

⁸⁸ *Mathews v. Bank of Farmington*, 166 F. 3d 853 (7th Cir. 1999). In *Mathews* the Seventh Circuit held that information obtained during civil discovery was not public disclosed information pursuant to 31 U.S.C § 3730(e)(4)(A).

⁸⁹ *Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1163-1167 (3rd Cir. 1991).

⁹⁰ *Id.* at 1162.

Senate's proposed six-month rule as evidence that the minority view is correct.⁹¹ The original House amendments proposed to bar *qui tam* suits if based solely on publicly disclosed information.⁹² A subsequent Senate bill proposed barring *qui tam* suits based on government disclosed information, or information disseminated by the news media, unless the government failed to proceed within six months of obtaining the information.⁹³ Both Scirica and Vogel assert that the six month rule reflects Congress' concern that government resources alone were insufficient to seek out and prosecute fraud. By permitting a potential *qui tam* relator to proceed with a suit even when the government had the information, Congress ensured that information about fraud was not overlooked or buried in a vast government morass. In the event the government knew about the fraud, but lacked the funding or manpower to prosecute the wrongdoer, the proposed language allowed the government to supplement its resources. Admittedly, this approach would permit some parasitic relators to file suit successfully. The six-month interim, however, would prevent

⁹¹ Vogel, *supra* note 62, at 509-510. See also *Stinson v. Prudential Ins. Co.*, 944 F.2d at 1163-1167.

⁹² See Vogel, *supra* note 62 at 507 (citing H.R. Rep.4827 at 23).

⁹³ *Stinson v. Prudential Ins. Co.*, 944 F.2d at 1164 (citing S. Res. 1562, 99th Cong., 1st Sess., § 2, at 3 (1985)). The proposed language read:

Unless the Government proceeds with the action within 60 days after being notified, the court shall dismiss the action brought by the person if the court finds that-

- (A) the action is based on specific evidence or specific information *the Government* disclosed as a basis for allegations made in a prior administrative, civil, or criminal proceeding;
- (A) or the action is based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media (emphasis added).

Id. at 1164. The provision goes on to read, "[I]f the government has not initiated a civil action within *six months* after becoming aware of such evidence or information, or within such additional time as the court allows upon a showing of good cause, the court shall not dismiss the action brought by the person (emphasis added)." *Id.*

would-be relators from rushing to the courthouse before the government had an opportunity to act. After the Department of Justice voiced its concern that the proposed language could possibly thwart government investigations, the Senate Judiciary Committee proposed a version that precluded the filing of a *qui tam* suit within six months of certain specified disclosures.⁹⁴ After further negotiations, the legislature dropped the six months language incorporating in its stead the statute's current language.⁹⁵

The language in the original House proposal is identical to how the minority interprets “based upon” as it relates to a public disclosure. The original amendment proposed barring suits based solely on publicly disclosed information. The minority’s “derived from” definition of “based upon” reaches the same result. If a *qui tam* suit is derived from a public disclosure it is based solely on that public disclosure. Not only does the minority approach mirror the language in the original proposed 1986 amendment, it clearly meets Congress’ intent as expressed in the proposed six-month language. The six-month rule would have

⁹⁴ *Id.* at 1165. The proposed language read:

In no event may a person bring an action under this section based upon allegations or transactions which are the subject of a civil suit in which the Government is already a party, or within *six months* of the disclosure of specific information relating to such allegations or transaction in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media (emphasis added).

Id.

⁹⁵ See Vogel, *supra* note 62, at 508. Mr. Vogel asserts that Congress’ failure to adopt the six-month rule manifests its dissatisfaction with the 1943 Amendments’ jurisdictional bar. He notes that in lieu of the six-month language the 1986 Congress incorporated the public disclosure language into the statute. As long as the relator was the original source of the publicly disclosed information she could file suit successfully. This includes public information that the government already has in its possession. Mr. Vogel argues that this is contrary to the strict prohibition the 1943 Amendments placed on information already in the government’s possession. *Id.*

permitted suits based on information the government possessed if it took no action on that information after six-months. This would have lowered the jurisdictional bar. The minority's narrow view of what is a public disclosure pursuant to section 3730(e)(4)(A) also lowers the jurisdictional bar from the high position established by the 1943 Amendments. This is what the 1986 Congress intended. The fact that the that the legislature failed to include the six-month language does not indicate that Congress no longer wanted private citizens to supplement the government's limited investigative and enforcement resources. The exact opposite was true. Congress manifested this intent by allowing private persons to remain as a *qui tam* plaintiff in a suit after the government elected to intervene.⁹⁶

In addition to considering the proposed six-month rule, a review of Congress' actions after the 1986 Amendments went into effect also supports the assertion that the minority's definition of "public disclosure" is correct. In 1992, Congress attempted to resolve the conflicting judicial interpretations that were cropping up already by drafting an amendment that clarified the 31 U.S.C. § 3730(e)(4) bar. The proposed language limited the jurisdictional bar to suits in which all of the allegations came from matters listed specifically in the statute.⁹⁷ If this amendment had passed it would have directly conflicted with the

⁹⁶ See *id.* at 509, 510.

⁹⁷ See Fentin, *supra* note 1 (referencing H.R. 4563, 102d Cong., 2d Sess (1992)). The 1986 Amendment to 31 U.S.C. § 3730(e)(4)(a) read as follows:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or *administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media*, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information (emphasis added).

majority's broad view of a public disclosure. The majority definition not only exceeds the matters specifically listed in the statute, in addition it includes information that is potentially discoverable. The amendment died during subsequent negotiations. Despite the defeat of the 1992 proposal, Congress attempted again in 1993, to clarify the FCA's *qui tam* jurisdictional bar. At that time Senator Grassley proposed an amendment that completely did away with section 3730(e)(4).⁹⁸ During the course of joint committee hearings, Senator Grassley and Congressman Berman both stated that a key point of the clarification was that only suits based upon information contained in matters specifically listed should be jurisdictionally barred. They believed that this would preclude truly parasitic suits and still encourage private citizens to join in the fight against contractor fraud. This proposed amendment also failed to pass.⁹⁹

Id. at 262. The proposed amendment would have provided additional direction pertaining to the second element of Prong I. The proposed language included the following:

- (4)(A) No court shall have jurisdiction over an action brought under subsection (b) in which all of the material facts and allegations are obtained from a news media report or reports, or a disclosure to the general public of a document or documents-
 - (i) created by the Federal Government;
 - (ii) filed in a lawsuit to which the Federal Government is a party; or
 - (iii) relating to an open and active investigation by the Federal Government; unless the person bringing the action is an original source of such facts and allegations.

Id., at 265 n.74.

⁹⁸ *Id.* at 266. In lieu of § 3730(e)(4) Senator Grassley proposed to beef-up § 3730(b) to read:

- (6)(A) No later than 60 days after the date of service under paragraph (2), the Government may move to dismiss from the action the *qui tam* relator if, (i) all the necessary and specific material allegations contained in such action were derived from an open and active fraud investigation by the Government; or (ii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States

Id.

⁹⁹ *Id.* at 267.

Regardless of the approach used, whether it is Vogel and Scirica's argument regarding the proposed six-month rule, or the subsequent failed amendments, the conclusion is the same. The minority approach is the correct one. The result of narrowly defining public disclosure is that it limits the number of instances the second element in Prong I, the "based upon" element, is considered. The natural result of this is it allows more potential *qui tam* relators to file suit. The minority's definition of "based upon" also produces the same result.

The majority of circuit courts define "based upon" as "supported by." Using the majority's approach a relator who discovers independently evidence of fraud cannot successfully bring suit if another source has publicly disclosed the information. When the relator discovered the fraud compared to when the other source publicly disclosed the information does not matter. The fact that the government is not prosecuting the matter would be irrelevant. The result is dismissal of the relator's suit and the fraud goes potentially unprosecuted. Such an outcome is clearly contrary to spirit of the FCA. One of the issues the 1986 Amendments hoped to address was the lack of government resources to prosecute fraud. A means to correct the problem was the privatization of the statute's enforcement mechanism. This would allow regular citizens to pursue possible fraud when lack of manning or finances prevented the government from doing so. The majority's broad definition of "based upon" clearly flies in the face of that intent.

The minority's interpretation of "based upon" as meaning "derived from" is the correct interpretation. The majority shunned this approach fearing that such a reading would allow

undeserving plaintiffs to profit. Congress clearly shared that concern when drafting the amendments. Specifically, Congress provided a fee schedule for *qui tam* relators. The schedule provides that if a suit is based substantially on publicly disclosed information and the relator is not the original source of the information, the court has discretion over the amount of the award. It caps the amount such a relator could recover to ten percent of the proceeds.¹⁰⁰ This statutory provision is in keeping with the 1986 Congress' desire to lower the *qui tam* jurisdictional bar and allow in more relator suits. However, it is important to consider that by incorporating a monetary cap Congress acknowledged that having a lower bar could result in instances where a parasitic relator could successfully file suit. The ten percent cap decreases how much a parasitic relator is unjustly enriched.

The majority's use of the "supported by" standard ignores the fact that Congress clearly envisioned instances where a relator was not the primary source of the information. In contrast, the minority's "derived from" definition acknowledges that in some instances information may come from two independent sources, one publicly disclosed, the other not. Rather than preclude the honest relator from filing suit, the minority takes that practical approach acknowledged by Congress that a lower jurisdictional bar there may result in the

¹⁰⁰ False Claims Act of 1863, 31 U.S.C.S. § 3170(d)(1) (LEXIS 2000). This section contains the following:

Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the actions in advancing the case to litigation

Id. If the suit is not primarily based on disclosed information the relator can receive "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." *Id.*

successful filing of a parasitic suit. The majority argues that it has to use such restrictive language or it will render the second prong superfluous. The majority completely ignores the fact that it is rendering section 3170(d)(1) superfluous.

In June 1999, Congressman Berman addressed the bittersweet consequences of the 1986 Amendments. He noted proudly that revitalizing the FCA had resulted in the recovery of a significant amount of money. He opined that the Amendments' greatest success, however, was not the amount of money recovered, but in the amount of fraud deterred.¹⁰¹ Despite the success of the FCA's 1986 Amendments, Congressman Berman expressed his and Senator Grassley's concern that some of the circuit courts misinterpreted section 3730(e)(4)(A), and this was causing confusion among the circuits. They feared that this confusion would have a chilling effect on would-be *qui tam* relators. What is disappointing about Congressman Berman's statements is his proposed solution. He stated that it was his opinion that the Department of Justice (DoJ), as the primary enforcer of the statute, should take a more assertive stance when litigating FCA cases. He proposed that DoJ could do this by arguing

¹⁰¹ Hon. Howard L. Berman, Remarks before the House of Representatives (Wed. July 14, 1999), *available at* <<http://thomas.loc.gov/cgi-bin>>. In his remarks to the House of Representatives, Congressman Berman stated:

The biggest payoff however has been in the deterrence of fraud . . . It is not an overstatement to suggest that there has been a cultural shift within companies that do business with the government. Because of the vigilance of the citizenry and the use of the *qui tam* provisions of the False Claims Act, companies and entities are changing the way they do business with the government. Instead of developing strategies of "revenue enhancement" when dealing with the government, these same entities are developing new compliance programs to ensure that the government is not overcharged. This shift has occurred for one fundamental reason: The risks of getting caught, exposed and subjected to substantial penalties have grown tremendously as a direct result of the reinvigoration of the government's fraud enforcement caused by the 1986 amendments.

Id.

clearly the correct definition of “public disclosure” and “based upon.”¹⁰² Congressman Berman’s proposed solution most likely will not have the desired effect. The problem is not DOJ’s enforcement of the statute. The problem is the circuit courts’ reluctance to read the statute in a manner that would potentially allow a parasitic relator to collect any money. In addition, it seems incongruous to make DOJ responsible for clearing up this confusion when the intent of the 1986 Amendments was to supplement sparse government resources. The circuit courts are giving Congress a *Marcus v. Hess* type wake-up call. It is up to Congress to address the issue and pass the necessary legislation.

Goldilocks was saddened by her discovery of contractor fraud and Mr. Supervisor’s failure to act after she told him about it. She went for a walk in the woods hoping it would make her feel better. After a while she saw a pretty cottage amid the trees. Tired and hungry from her long walk, Goldilocks decided to stop. Finding no one at home she entered the cottage. In the kitchen she found a table set with three bowls. Hungry, Goldilocks sat down in the first chair. It was hard and hurt Goldilocks’ backside. Determined to eat, she picked up the spoon, dipped it into the bowl, and took a bite of porridge. “Ouch,” cried Goldilocks. The porridge was so hot that it burned her mouth. Goldilocks’ mouth smarted and her backside ached. “I wonder why anyone would make food so hot and a chair so hard if they wanted people to sit down and eat,” she wondered. “Why, this is exactly the way the circuit court treated me,” she thought. The judge had barred her *qui tam* suit because the fraud she discovered was subsequently disclosed to the townsfolk in the annual report. “Does the circuit court think more people will share their information about fraud when its restrictive interpretation makes it difficult to get into the courthouse,” she exclaimed. Look around she saw a nice, middle-sized chair. On the table in front of it was another bowl of porridge. The chair was soft and inviting when Goldilocks sat down in it. She dipped her spoon in the bowl and took a bite. “Oh, this is the way a chair is suppose to feel and porridge is suppose to taste,” sighed Goldilocks. Having a wide enough, comfortable chair and warm porridge encouraged a person to sit down and partake of the food. “Ah ha,” exclaimed Goldilocks. “If the circuit court did not interpret ‘based upon’ and ‘public disclosure’ in such a restrictive manner, more relators could prosecute bad contractors just like this nice chair and porridge encourages me to sit down and eat,” she thought. Then it would be a just right circuit.

¹⁰² *Id.* Congressman Berman and Senator Grassley wrote Attorney General Reno expressing their concerns about the “public disclosure” bar. They asked that the DoJ “be especially vigilant in helping courts correctly implement the Congressional policy that underlies the ‘public disclosure’ bar.” *Id.*